

LUKAS, NACE, GUTIERREZ & SACHS
CHARTERED
1650 TYSONS BOULEVARD
SUITE 1500
McLEAN, VIRGINIA 22102
(703) 584-8678

DAVID A. LaFURIA
ADMITTED IN DC AND PA ONLY
(703) 584-8666

November 15, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, DC 20554

Re: Federal-State Joint Board on Universal Service
Petition for Waiver – Expedited Action Requested
filed by Smith Bagley, Inc.
CC Docket No. 96-45

Dear Madam Secretary:

On behalf of Smith Bagley, Inc. (“SBI”), we write to follow up on a request from the Commission staff to provide an alternative proposal in connection with SBI’s Petition for Waiver¹ (“Petition”) in the above-referenced proceeding.

In SBI’s original Petition, it requested a waiver of Section 54.400(e) of the Commission’s rules, 47 C.F.R. Section 54.400(e) to define, in this unique circumstance, the entirety of the Eastern Navajo Agency as “near reservation land.” On September 9, 2004, SBI submitted to the Commission two maps, one describing the Eastern Navajo Agency and its historic development pursuant to various treaties and executive orders, and another depicting the outer boundary of the Eastern Navajo Agency and its constituent land designations.

We believe the Commission now has everything it needs to accurately describe an area within which a waiver could be granted to permit Tier 4 Lifeline and Link-up benefits to be made available throughout the Eastern Navajo Agency. We also understand that SBI’s proposal requesting the Commission to designate the Eastern Navajo Agency as “near reservation” land

¹ Smith Bagley, Inc., Petition for Waiver – Expedited Action Requested, CC Docket No. 96-45 (filed March 19, 2004).

may be unnecessarily complicated because the FCC's definition of "near reservation" contained in Section 54.400(e) has been stayed.² Accordingly, we offer herein an alternative proposal.

As an alternative to SBI's original proposal, SBI requests the Commission to waive Section 54.400(e), which defines an eligible resident of Tribal lands as a "qualifying low-income consumer," as defined in paragraph (a) of this section, living on or near a reservation." The Commission may waive its rules and declare that Tier 4 Lifeline and Link-up support is available to qualifying consumers in the Eastern Navajo Agency, without designating it as reservation or near reservation land, because there here exists unusual factual circumstances which would cause strict application of the rule to be contrary to the public interest. See, 47 C.F.R. Section 1.925(b)(3)(ii).

As set forth in SBI's original waiver request, the circumstances now present on the Eastern Agency are extraordinary. There are approximately 37,400 persons living within the Eastern Navajo Agency boundaries.³ Roughly 45% of the households subsist at or below the federal poverty level, with median household income at \$18,737.⁴ 38% of households lack plumbing.⁵ Unemployment stands at 31%. Roughly 52% of households rely on wood for heat.⁶ Most important for purposes of this waiver, **67% of occupied housing units do not have telephone service.**⁷ Based on SBI's experience in the region, there are significant geographic areas within the Eastern Navajo Agency that are inhabited but where no telephone service is available. On information and belief, these dire conditions have not improved substantially for decades.

SBI has not been able to identify another area in the United States of similar geographic size or population that suffers from these types of conditions. No telephone company is eligible to extend Tier 4 Lifeline and Linkup benefits to residents in the Eastern Navajo Agency and as a result, no significant telephone penetration gains have been recorded since the Commission adopted Tier 4 benefits in 2000. On information and belief, there is no substantial penetration of high-speed Internet access of any sort in this region.

Strict application of the rule will serve only to frustrate the public interest and the Commission's stated goal of increasing telephone penetration to unserved and underserved areas,

² *Federal-State Joint Board on Universal Service, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12,208 (2000) ("*Twelfth Report & Order*"); *stayed in part, Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 17,112 (2000).

³ Source: U.S. Census 2000.

⁴ Source: U.S. Census 2000.

⁵ Source: U.S. Census 2000.

⁶ Source: U.S. Census 2000.

⁷ Source: U.S. Census 2000.

especially where Native Americans are involved. As stated in SBI's original waiver request, roughly 92% of the residents within the Eastern Agency boundaries are Navajo tribal members. Thus, relief would squarely target Native American consumers, whom the Commission has repeatedly identified as being unserved or underserved by telecommunications facilities.⁸

Waiving the eligibility rule will further the public interest in enabling all ETCs in this area to offer Tier 4 Lifeline discounts. A waiver will facilitate the provision of vital health and safety benefits to literally thousands of people.⁹ Grant of SBI's request will promote public health and safety and advance the public interest in increasing telephone penetration among Native Americans. As stated in the waiver request, SBI's success in serving Native American populations is well documented and there is every reason to believe it will be successful in extending its innovative outreach efforts to the Eastern Navajo Agency.¹⁰

We trust that you will find this information to be useful. Should you have any questions or require any additional information, please contact undersigned counsel directly.

Sincerely,



David LaFuria
Counsel for Smith Bagley, Inc.

⁸ See, e.g., *Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18133, 18138 (2001); *In the Matter of Extending Wireless Telecommunications Services to Tribal Lands*, 15 FCC Rcd 11794, 11798 (2000); *Twelfth Report and Order*, *supra*, 15 FCC Rcd at 12211-12.

⁹ See, *Illinois Central College*, 19 FCC Rcd. 2735, 2737 (Wireless Bur. 2004); *Gaston County, North Carolina*, 19 FCC Rcd 408, 410 (Wireless Bur. 2004). See also, *Federal-State Joint Board on Universal Service, Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking*, 14 FCC Rcd 21177, 21179 (1999) ("The absence of telecommunications service in a home puts its occupants at a tremendous disadvantage in today's society. Parents cannot be reached when urgent situations arise at school. Job seekers cannot offer prospective employers a quick and convenient means of communication. People in immediate need of emergency services cannot contact police departments, fire departments, or medical providers. In short, telephone service provides a vital link between individuals and society as a whole. Given the importance of telephone service in modern society, it is imperative that the Commission take swift and decisive action to promote the deployment of facilities to unserved and underserved areas and to provide the support necessary to increase subscribership in these areas.")

¹⁰ See, *Lifeline and Linkup*, 19 FCC Rcd. 8302, 8350 (2004) ("In Arizona and New Mexico, Smith Bagley, a wireless carrier, conducts intensive advertising campaigns on tribal reservations in service areas where they are designated as an ETC. One of its most successful forms of outreach is its day-long event. Smith Bagley moves its storefront into town for a day and hosts a sign-up event where customers can learn about wireless service, determine their eligibility for Lifeline/Link-Up, sign up for service, have car installations done, obtain training on using a cell phone, and ask Smith Bagley's staff any questions they may have about Lifeline/Link-Up or wireless service. This unique outreach event has led to an increase of 14,000 new Lifeline subscribers.")